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No. .....

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO, LOCAL 846, INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO, LOCAL 970, INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO, LOCAL 1248, INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO,

Petitioners,

v.

HAMPTON ROADS SHIPPING ASSOCIATION,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

THOMAS W. GLEASON
90 Broad Street, Suite 600
New York, New York 10004
(212) 425-3240

Attorney for Petitioners

Of Counsel:

ERNEST L. MATHEWS, JR.
CHARLES R. GOLDBURG

Questions Presented for Review

1. After a union has voluntarily submitted its grievance to arbitration in accordance with its collective bargaining agreement and has prevailed at the arbitration, does this Court's decision in *Boys Markets, Inc.* v. *Retail Clerks Union,* 398 U.S. 235 (1970), permit a district court to issue an injunction against work stoppages to enforce the award pending judicial review, despite the provisions of § 4 of the Norris-LaGuardia Act, 29 U.S.C. § 104?

2. Does a district court have jurisdiction to restrain a work stoppage aimed at enforcing an arbitration award, where the collective bargaining agreement reserves to the union the right to strike to enforce the award and specifically makes inapplicable the provisions of any no strike clause?

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To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Petitioners, International Longshoremen's Association, AFL-CIO (ILA), and its Locals 846, 970, and 1248, pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit entered in the above-entitled case on October 23, 1984.

Opinions Below

The opinion of the court of appeals is reported at 746 F.2d 1015 and is reproduced as Appendix A to this petition (1a-7a). The opinion of the district court, which is

not reported, is reproduced as Appendix B to this petition. (8a-29a).

Jurisdiction

The judgment of the court of appeals was entered on October 23, 1984. Appendix C at 30a. A timely petition for rehearing was denied on November 20, 1984. Appendix D at 31a. The jurisdiction of this court is invoked under 28 U.S.C. § 1254(1).

Statute Involved

The relevant statutory provision is § 4(a) of the Norris-LaGuardia Act, 29 U.S.C. § 104(a).

> § 104. Acts not subject to restraining orders or injunctions
>
> No court of the United States shall have jurisdiction to issue any restraining order or temporary or permanent injunction in any case involving or growing out of any labor dispute to prohibit any person or persons participating or interested in such dispute (as these terms are herein defined) from doing, whether singly or in concert, any of the following acts:
>
> (a) Ceasing or refusing to perform any work or to remain in any relation of employment;

Statement of the Case

In early August 1984, Petitioner ILA and its locals on the East and Gulf Coasts, engaged in a series of work stoppages aimed at enforcing an arbitration award.[1] This

[1] Work stoppages to enforce the award occurred in Norfolk, Virginia, Wilmington, North Carolina, Charleston, South Carolina, Savannah, Georgia, Miami, Florida, and Houston, Texas.

case presents for review a decision of the Court of Appeals for the Fourth Circuit which, despite an express provision in the collective bargaining agreement abrogating any no strike clause, affirmed the issuance of a preliminary injunction to restrain a union from work stoppages to enforce the award in its favor. In identical circumstances, the Fifth Circuit reversed and vacated a similar injunction.[2]

The Master Contract[3] between the ILA, and the multi-employer bargaining group representing management associations in 36 Atlantic and Gulf Coast Ports provides for the arbitration of disputes concerning its Containerization Agreements.[4] "All cases" relating to the Containerization Agreement are to be decided, either initially or after the completion of local grievance procedures, by a joint-labor management committee, known as the Management-ILA Emergency Hearing Panel (EHP). The Panel is composed of an equal number of management and labor representatives and is governed by majority rule. A deadlock results

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[2] *West Gulf Maritime Ass'n* v. *ILA Deep Sea Local 24, etc.*, No. 84-2442 (5th Cir. Jan. 7, 1985), *reh'g denied*, Feb. 7, 1985. The Fifth Circuit's decision is not yet reported. A copy of the slip opinion appears as Appendix E to this petition.

[3] In the longshore industry, collective bargaining is conducted on a coastwide basis as to 7 "Master Contract" issues, including containerization. All other terms and conditions of employment are negotiated on a local basis.

[4] The Court is familiar with the importance to the longshore industry of collectively bargained efforts to deal with the technological revolution known as containerization. *See NLRB* v. *International Longshoremen's Ass'n*, 447 U.S. 490 (1980). *See also American Trucking Ass'ns, Inc.* v. *NLRB*, 734 F.2d 966 (4th Cir. 1984), *reh'g denied*, July 31, 1984, *cert. granted*, Jan. 21, 1985. In an effort to ameliorate job displacement while implementing the new technology, management and the ILA have adopted not only the Rules on Containers, which are now before the Court, but also the Containerization Agreement. The latter establishes the working conditions governing the loading and unloading of containers on and off vessels, as distinct from the loading and unloading of cargo into and out of containers, which are covered by the Rules.

in outside arbitration. The Master Contract provides that decisions of the EHP are final and binding. They may, but need not, be judicially enforced.[5] The parties have further agreed in the Master Contract that the ILA shall have the right to refuse to render service to any carrier or direct employer who refuses to abide by a decision of the EHP. The provisions of any no-strike clause are rendered inapplicable in such situation.

On June 12, 1984, the EHP considered a dispute, arising in Galveston, Texas, between the ILA and West Gulf Maritime Association (WGMA)[6] with respect to the interpretation of ¶ 5 of the Containerization Agreement which provides that the minimum size of the container gang "shall consist of 18 men plus 2 drivers."[7] At the hearing before the EHP it was the union's position that in all ports ¶ 5 requires that any additional drivers above two must be secured from without the gang, notwithstanding local contracts or practice. When the matter was called for a vote, one of the management members of the panel abstained. The management co-chairman ruled that the abstention resulted in a decision in favor of the ILA, and an award was issued on June 14. The award was sent to all ILA locals and management associations coastwide.

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[5] While decisions of labor-management committees are not, strictly speaking, "arbitration awards", this Court has recognized that they are subject to enforcement in the same manner as arbitration awards. *General Drivers, Warehousemen & Helpers* v. *Riss & Co.*, 372 U.S. 517 (1963). For the sake of convenience and simplicity, petitioners will refer to the EHP decision as an arbitration award.

[6] WGMA is the employer association representing longshore employers in ports from Lake Charles, Louisiana to Brownsville, Texas and is a party to the Management-ILA Master Contract.

[7] Container "gangs" or teams of longshoremen are comprised of equipment operators or "drivers" as well as regular longshoremen who provide manual assistance but who do not operate the equipment.

The union commenced a proceeding against WGMA in the United States District Court for the Southern District of New York to enforce the EHP award. The Council of North Atlantic Shipping Associations, of which Respondent Hampton Roads Shipping Association is a member, intervened on WGMA's behalf. *See International Longshoremen's Association* v. *West Gulf Maritime Association*, 594 F. Supp. 670 (S.D.N.Y. 1984).

WGMA opposed enforcement of the EHP award in the New York action.[8] Meanwhile, employers all along the coast resisted compliance with the EHP award. When the ILA then engaged in work stoppages aimed at enforcement pursuant to the Master Contract, numerous employer associations responded by seeking preliminary injunctions to restrain the work stoppages and to compel re-arbitration of the dispute under grievance procedures in the local contracts.[9] The instant case arose when the petitioner ILA locals in Hampton Roads, Virginia, attempted to withhold labor to enforce the EHP award.

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[8] In addition to raising several procedural objections that had been considered and rejected by the EHP, WGMA claimed that the abstention by the management member did not result in a majority decision in favor of the ILA.

[9] The work stoppages to enforce the award led to litigation in 7 district courts. Appeals to the Fourth, Fifth and Eleventh Circuits followed. *ILA* v. *West Gulf Maritime Ass'n*, *supra*; *West Gulf Maritime Ass'n* v. *ILA Deepsea Local 24, etc.*, No. H-84-3362 (S.D. Tex. Aug. 13, 1984) (order granting preliminary injunction); *Hampton Roads Shipping Ass'n* v. *ILA*, No. 84-500-N (E.D. Va. Aug. 9, 1984) (order granting preliminary injunction); *S.E.L. Maduro* v. *ILA, Local 1416, Local 1416-A*, No. 84-1858-Civ. (S.D. Fla. Aug. 14, 1984) (order granting preliminary injunction); *Savannah Maritime Ass'n* v. *Local 1414, ILA*, No. 484-287 (S.D. Ga. filed Aug. 13, 1984); *South Carolina Stevedores Ass'n* v. *Local 1422, ILA*, No. 84-2007-8 (D.S.C. Sept. 11, 1984) (order granting preliminary injunction); *North Carolina Shipping Ass'n* v. *Local 1426, ILA*, No. 84-80-Civ-7 (E.D.N.C. Sept. 21, 1984) (order granting preliminary injunction).

In the case at bar, as in other cases, the district court relied on the exception to Norris-LaGuardia enunciated by this Court in *Boys Markets Inc.* v. *Retail Clerks Union*, 398 U.S. 235 (1970). Despite the fact that the "18 and 2" dispute had already been arbitrated under the Master Contract, the district court found that there was an "arbitrable" dispute under the local contract and that the requirements of *Boys Markets* were satisfied. Appendix B at 25a-26a. The district court issued an injunction against any and all work stoppages, including those aimed at enforcing the EHP award, and directed local arbitration of the dispute.[10]

On appeal, the Fourth Circuit recognized that the dispute had been arbitrated before the EHP whose decision was under review in the case in New York. The court of appeals vacated the direction for local arbitration but affirmed the injunction against work stoppages aimed at enforcing the EHP award. The court rejected petitioners' contention that the Master Contract expressly gave the union the right to withhold labor as to employers who refused to comply with an EHP award. It held that this clause "is predicated upon the existence of a valid award" and that validity of the

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[10] After the injunction was issued by the district court but before the court of appeals ruled, the district court in New York dismissed the ILA's petition for enforcement and remanded the matter to the EHP on the basis that, since it could not determine the meaning and effect of the abstention, it could not decide whether an enforceable award had issued. *ILA* v. *West Gulf Maritime Ass'n*, 594 F. Supp. 670, 677 (S.D.N.Y. 1984). The court remanded to the EHP to determine the meaning and effect of the abstention. On remand the abstention question was referred to an independent arbitrator who found that the abstention resulted in an award in favor of the ILA.

Since Norris-LaGuardia deprives the federal courts of subject matter jurisdiction, *Petrusch* v. *Teamsters Local 317*, 667 F.2d 297, 300 (2d Cir. 1981), *cert. denied*, 456 U.S. 974 (1982), and absence of subject matter jurisdiction cannot be cured by subsequent events, *Smith* v. *Sperling*, 354 U.S. 91 (1957), these later events are immaterial to the question of whether the district court had jurisdiction at the time it issued the injunction.

June 12 EHP award "had been questioned in the enforcement proceedings instituted by the union in the Southern District of New York." 746 F.2d at 1017-18, Appendix A at 5a,[11] Petitioners now seek a writ of certiorari to review that judgment.

Reasons for Granting the Writ

1. *The case involves important questions of national law and policy, concerning the interpretation and application of a prior decision of this Court and the jurisdiction of federal courts to issue labor injunctions.*

In *Boys Markets* this Court established the only nonstatutory exception to Norris-LaGuardia's blanket prohibition against injunctions in labor disputes. The Court had long recognized that Norris-LaGuardia's "language is broad because Congress was intent upon taking the federal courts out of the labor injunction business." *Marine Cooks & Stewards* v. *Panama Steamship Company,* 362 U.S. 365, 369 (1960).

However, in *Boys Markets,* the Court enunciated a limited exception to Norris-LaGuardia to accommodate the Act to the national policy favoring arbitration as the method of resolving labor disputes. The Court held that, if a union has agreed to arbitrate a dispute, an injunction against a work stoppage may issue where the union is striking over an arbitrable grievance rather than proceeding to arbitration. Thus, to qualify for a *Boys Markets* injunction, the strike must have either the purpose or the effect of evading an obligation to arbitrate. *Buffalo Forge Co.* v. *United Steelworkers,* 428 U.S. 397, 408 (1976).

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[11] The Fourth Circuit did not base its affirmance upon the Southern District of New York's failure to confirm, but upon the fact that "[f]rom the inception of this litigation . . . the validity of the award has been contested, and it has not yet been resolved." 746 F.2d at 1018, Appendix A at 5a.

The policies favoring arbitration and upholding the dispute resolution mechanisms agreed to in private collective bargaining are so fundamental to national labor law that, even prior to *Boys Markets,* the Court has displayed a readiness to decide questions in this area.[12] Following *Boys Markets,* the Court has thrice elucidated upon the scope and meaning of its decision in that case. *Gateway Coal Company* v. *United Mine Workers,* 414 U.S. 368 (1974); *Buffalo Forge Co., supra; Jacksonville Bulk Terminals* v. *International Longshoremen's Association, AFL-CIO,* 457 U.S. 702 (1982). The case at bar presents a question more fundamental and important to the *Boys Markets* doctrine than any the Court has been called upon to decide since 1970.

Where a union has engaged in arbitration and obtained an award in its favor, it would seem that the goal of *Boys Markets* to protect the arbitral process, 398 U.S. at 253, has been attained. This Court has never addressed the question of whether a federal court has jurisdiction to restrain a work stoppage once an arbitration award resolving the dispute has been rendered. However, the courts of appeals in interpreting *Boys Markets* have engrafted upon agreements to arbitrate the additional obligation to obtain judicial enforcement.

In 1980 the Fifth Circuit held that a *Boys Markets* injunction, once obtained, could continue in force until the arbitration award was judicially sanctioned, "absent express agreement to the contrary." *Sea-Land Service, Inc.*

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[12] *See Textile Workers* v. *Lincoln Mills,* 353 U.S. 448 (1957); *United Steelworkers* v. *American Mfg. Co.,* 363 U.S. 564 (1960); *United Steelworkers* v. *Warrior & Gulf Navigation Co.,* 363 U.S. 574 (1960); *United Steelworkers* v. *Enterprise Wheel & Car Corp.,* 363 U.S. 593 (1960); *Local 174, Teamsters* v. *Lucas Flour Co.,* 369 U.S. 95 (1962); *Sinclair Refining Co.* v. *Atkinson,* 370 U.S. 195 (1962); *International Longshoremen's Association* v. *Philadelphia Marine Trade Association,* 389 U.S. 64 (1967); *Avco Corp.* v. *Aero Lodge No. 735,* 390 U.S. 557 (1968).

v. *International Longshoremen's Association,* 625 F.2d 38, 42 (5th Cir. 1980).[13]

In the case at bar, the Fourth Circuit has gone one step further and has ruled that the union may not strike to enforce an award pending judicial confirmation even where its contract with management expressly gives it that right. The effect of the Fourth Circuit rule is to make judicial enforcement a mandatory part of the arbitral process in labor disputes. Contrary to the very *raison d'etre* of arbitration as a more expeditious, less expensive alternative to litigation, this decision makes resort to the courts a virtual certainty in every arbitrated dispute.

At the same time, the Fourth Circuit has deprived the parties, management and labor alike, of the right to settle their own affairs through collective bargaining. Under the decision for which review is sought, even an express reservation of the right to strike pending judicial review is vitiated, and a term requiring judicial enforcement implied in every labor contract to arbitrate.[14]

The effect of the decision in this case can only be a disincentive to enter agreements to arbitrate. If judicial review is a foregone conclusion, the advantages of the arbitral system are shorn away. Unions are hardly likely to bargain away their right to self-help for an alternative in which, even when they prevail, the fruits of victory are postponed until after long and costly legal battles.[15]

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[13] In *Sea-Land* the strike had occurred and the injunction had issued prior to the arbitration. The court was not confronted with a situation where the injunction was applied for in the first instance only after an arbitration award had already been rendered.

[14] This Court is well aware that a preliminary injunction is often dispositive in a labor dispute. *Buffalo Forge*, 428 U.S. at 412. The game is for the employer to get the injunction and "head for the hills."

[15] In *Boys Markets*, the Court recognized that employers will be unwilling to enter into agreements to arbitrate if a union retains

(footnote continued on following page)

The ramifications for the policies favoring arbitration and the speedy resolution of labor disputes and for the free collective bargaining process would warrant review by this Court in any event. Moreover, since the case involves the jurisdiction of United States courts under an act of Congress, it should be decided by the Supreme Court, which has the prime responsibility for the proper functioning of the federal judiciary.

Review is all the more called for because what is at issue is the application and effect of a prior decision of the Supreme Court. *Boys Markets* injunctions are a creature of this Court. Only it can define their limits. The question of whether the bar of Norris-LaGuardia is lifted after the parties have complied with their duty to arbitrate is so basic as to require resolution by the highest Court.

2. *The Court should grant certiorari to resolve a conflict among the circuits as to whether a federal court has jurisdiction to restrain a work stoppage where the union has reserved the right to strike to enforce an arbitration award.*

The Fourth Circuit's decision in this case is directly at odds with the previous decision of the Fifth Circuit in *Sea-Land*. The Management-ILA Master Contract contains the express reservation of the right to strike which *Sea-Land* recognizes as efficacious during the period pending judicial confirmation. *Sea-Land*, 625 F.2d at 42. *West Gulf Maritime Association*, Appendix E at 46a. (The contractual provision is set forth in the Fifth Circuit's opinion. Ap-

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the right to strike rather than resorting to the arbitration machinery. 398 U.S. at 248. If federal courts were without jurisdiction to enforce the agreement to arbitrate, the federal policy favoring arbitration would be frustrated. Correspondingly, if unions are required to seek judicial confirmation of the award prior to resorting to self-help, they will be equally discouraged from entering into arbitration agreements, and the federal policy will be similarly frustrated.

pendix E at 37a.) The rule in the Fourth Circuit denies effect to the reservation.

In another case arising out of the union's efforts to enforce the June 12, 1984, EHP award, the Fifth Circuit reaffirmed the *Sea-Land* doctrine while holding that the principle of comity required the district court in Texas to defer to the district court in New York. *West Gulf Maritime Association,* Appendix E at 46a.

The conflict between the two circuits could not be more open or direct. Since a third case generated by the same arbitral award will be argued before the Eleventh Circuit in March 1985, still another court of appeals will be drawn into the conflict. The Eleventh Circuit may adopt one of the two positions already enunciated or may arrive at still another interpretation of *Boys Markets* that conflicts with both.

A split in the circuits on such a basic and important question of national labor law is, in and of itself, grounds for review by the Supreme Court. When that split is occasioned by disagreement among the courts of appeals as to the meaning and intent of this Court's prior decision, the grounds are more compelling.

The present case presents still an additional factor favoring Supreme Court review. The conflict here involves not merely differing views about a principle of law but disagreement as to the rights and duties under the same collective bargaining agreement. Although intended to be uniform in every ILA port, the Master Contract will, if the present situation is not altered, have different effects in different jurisdictions. The ramifications this has for collective bargaining in an industry vital to the nation's economy urge this Court to resolve the conflict.

Ironically, the decision for which review is sought fosters precisely the harm which had been envisioned by the dis-

trict courts.[16] Ports in the Fifth Circuit may be placed at a competitive disadvantage vis-a-vis those in the Fourth. Ports in the Eleventh Circuit will be advantaged or disadvantaged in relation to the neighboring jurisdictions, depending on how that Circuit rules.

Because this case involves collective bargaining in a major industry and has the judicially recognized potential to affect established patterns of trade and the national economy, this Court should grant a writ of certiorari to resolve the conflict among the circuits.

CONCLUSION

For the foregoing reasons, Petitioners pray that a writ of certiorari be issued to review the judgment and decision of the United States Court of Appeals for the Fourth Circuit in this case.

Dated: February 14, 1985

Respectfully submitted,

THOMAS W. GLEASON
90 Broad Street, Suite 600
New York, New York 10004
(212) 425-3240

Attorney for Petitioners

Of Counsel:

ERNEST L. MATHEWS, JR.
CHARLES R. GOLDBURG

[16] Each district court found as the irreparable harm necessary to a preliminary injunction the likelihood that, if the EHP's interpretation of the Containerization Agreement were applied in its port, cargo would be diverted to other ports where a different interpretation made for lower costs. Traffic lost during the pendency of confirmation (8 months to date, and there is still no decision) may never be recaptured.